Supreme Court, U.S.
FILED
OCT 13 2004
OFFICE OF THE CLERK

No. 04-511

In The

Supreme Court of the United States

PHILIP C. REES,

Petitioner,

vs.

THE CITY OF GLENDALE ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Appellate Division Of The Los Angeles County Superior Court Of California

PETITION FOR WRIT OF CERTIORARI

PHILIP C. REES, *Attorney Pro Se*
410 East Harvard Street, #A
Glendale, California 91205-1058
(213) 351-8520 or (818) 507-8980

October 13, 2004

QUESTION PRESENTED

Whether a Director of Public Service who timely receives his customer's written protest of a disputed bill not "containing all facts and evidence necessary to review the protest"[1] may then—as a matter of constitutional due process of law—disregard that protest?

[1] Q.v., G.M.C. § 13.44.500B (1999), or see the "Laws Involved in the Case" section below.

PARTIES TO THE PROCEEDINGS

The Petitioner is *Philip C. Rees*, a customer of Glendale *Water & Power* since January 1998.

The Respondents are:

- *City of Glendale*, a municipal corporation[2] and owner-operator of Glendale *Water & Power*.[3]
- *Steven Lins*, Assistant City Attorney.
- *Bernard Palk*, Director of the Public Service Department.[4]
- *Tami Vallier*, Collections Supervisor.

---

[2] Q.v., Glendale City Charter, art. III, § 1 and § 2, subd. 2, and Cal. Const., art. XI, § 8.

[3] Q.v., Glendale City Charter, art. III, § 2, subd. 8.

[4] Q.v., Glendale City Charter, art. XXII, § 1.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS AND ORDERS ENTERED IN THE CASE	1
BASIS FOR JURISDICTION	2
LAWS INVOLVED IN THE CASE	2
STATEMENT OF THE CASE	3
A. Introduction to the Case	3
B. Facts of the Case	4
C. Trial Court's Position on the Federal Question Presented	6
D. Appellate Division's Position on the Federal Question Presented	8
REASONS FOR ALLOWING THE WRIT	11
I. Appellate Decision on Federal Question Presented Increases Public Disorder	11
II. Appellate Decision on Federal Question Presented Does Not Follow Precedent	16
CONCLUSION	23
TABLE OF APPENDICES	App. i

TABLE OF AUTHORITIES

Page

CONSTITUTIONAL AUTHORITY

Cal. Const., art. XI, § 8 ii

U.S. Const. amend. XIV, § 1 ..... 3, 23

CHARTER AUTHORITY

Glendale City Charter, art. III, § 1 ii

Glendale City Charter, art. III, § 2, subd. 2 ii

Glendale City Charter, art. III, § 2, subd. 8 ii

Glendale City Charter, art. VIII, § 2 22

Glendale City Charter, art. XXII, § 1 ii

CASE AUTHORITY

E. C. Schultz v. Town of Lakeport, 54 P.2d 1110 (Cal. 1936) 3, 17, 18, 19

McCarthy v. Madigan, 503 U.S. 140 (1992) 22

Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1977) 3, 6, 9, 10, 14

Myers v. Bethlehem Corp., 303 U.S. 41 (1938) 22

Smith v. City of Glendale et al., 36 P.2d 1083 (Cal. Ct. App. 1934) 20

Unemployment Compensation Comm'n of Alaska v. Aragon, 329 U.S. 143 (1946) 20, 21

Weinberger v. Hynson, Westcott and Dunning, Inc., 412 U.S. 609 (1973) 21, 22

TABLE OF AUTHORITIES – Continued

Page

STATUTORY AUTHORITY

28 U.S.C. § 1257(a) 2

Cal. Civ. Proc. Code § 632 ..... 7, 12

Cal. Civ. Proc. Code § 663[1.] 8

Cal. Gov't Code § 815.6 11

Cal. Gov't Code § 820.2 14

Cal. Pub. Util. Code § 10010(b) 16

G.M.C. § 13.44.500A (1999) ..... *passim*

G.M.C. § 13.44.500B (1999) ..... *passim*

G.M.C. § 14.44.440 (1997) 20

COURT RULES

Cal. Rules of Court, rule 28(a)(1) 2

OTHER AUTHORITY

THE FEDERALIST No. 10 (James Madison) 16

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Customer Rees respectfully petitions this Court for a writ of certiorari to the Appellate Division of the Los Angeles County Superior Court to review its June 8, 2004 decision in *Rees v. City of Glendale et al.* which held, as to the Federal Question Presented above, that: "defendants owed no duty to review plaintiff's [April 28, 2000 protest] pursuant to Glendale Municipal Code section 13.44.500(B) because [he] failed to provide 'all facts and evidence necessary for [Director Palk of Glendale *Water & Power*] to review the protest.'" (Appendix B, App. 13.)

OPINIONS AND ORDERS ENTERED IN THE CASE

The Thursday, January 2, 2003 Ruling on Submitted Matter and Order for Judgment of the Los Angeles Superior Court in Glendale California appears in Appendix A (App. 1-5). The Tuesday, June 8, 2004 Memorandum Judgment of the Appellate Division of the Los Angeles Superior Court in Los Angeles California appears in Appendix B (App. 6-14). The Thursday, July 1, 2004 Order Denying Rehearing and Denying Certification of the Appellate Division of the Los Angeles Superior Court appears in Appendix C (App. 15). And the Tuesday, July 15, 2004 Order of the Court of Appeal of the State of California, Second District, Division Seven in Los Angeles California appears in Appendix D (App. 16).

BASIS FOR JURISDICTION

According to 28 U.S.C. § 1257(a), petitioner respectfully requests the Supreme Court of the United States of America to review by writ of certiorari the June 8, 2004 decision (i.e., Memorandum Judgment, Appendix B, App. 6) of the Appellate Division of the Los Angeles Superior Court. The Appellate Division's subsequent Order Denying Rehearing and Denying Certification of the opinion was filed on July 1, 2004 (i.e., Appendix C, App. 15). And the California Court of Appeal's decision to deny transfer (i.e., Order, Appendix D, App. 16) was filed on July 15, 2004. As this July 15 order is the final decision[5] of "the highest court of [this] State,"[6] petitioner, therefore, makes this request for review.

LAWS INVOLVED IN THE CASE

> Electric service will not be disconnected if, within forty-eight hours following the delivery of a disconnection notice, a customer submits a written protest of the disputed bill containing all facts and evidence necessary to review the protest. The director of public service shall have final and conclusive determination of these protests and shall provide this determination to the customer in writing. Should the protest be denied, electric service shall be disconnected within either forty-eight hours from the date of personal service of the determination or within five days from the

[5] Q.v., Cal. Rules of Court, rule 28(a)(1).

[6] Q.v., 28 U.S.C. § 1257(a).

date of mailing of the determination. Q.v., Glendale Municipal Code § 13.44.500B (1999).

No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . . Q.v., U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A. Introduction to the Case

Your Honors: This case would *not* be before you if Director Palk, on May 3, 2000, had given Customer Rees written notice either to pay GWP's April 24, $159.05 demand immediately, or to suffer a cutoff of service by May 8.

This case would be before you *if* Director Palk had known of, and acted on, the appellate court's June 8, 2004 legal theory of the case (i.e., at Appendix B, App. 13, par. one) which permits—in violation of *Memphis Light* and in derogation of *E. C. Schultz*—a municipal utility to disregard a customer's protest and turn off his home electric service without a prior hearing or opportunity to pay the disputed bill and avoid a disconnection altogether. But he did not do this either.

This case *is* before you, however, because, during April 28 to June 5, 2000, Director Palk neither exercised his disconnection authority on May 1[7] nor did his notice duty on or before June 5[8] in response to Customer Rees' April 28 written protest. Director Palk on June 5 just disconnected

[7] I.e., G.M.C. § 13.44.500A (1999). *See* footnote 10 below.

[8] I.e., G.M.C. § 13.44.500B (1999). *See* footnote 11 below.

his customer's electric service and put him out of his dwelling.

B. Facts of the Case

On March 1, 2000, respondent Glendale *Water & Power* (GWP) billed petitioner. On April 2, and according to instructions on the bill,[9] petitioner wrote GWP for the name of the person who did the bill. On April 10, Assistant City Attorney Steven Lins, respondent, wrote that the bill was done "by a Public Service computer system," and that "GWP [did] not have a specific written Rule or Procedure that [it] used to determine if a bill [was] incorrect." Also on April 10, GWP billed petitioner again only for more money. On April 20, petitioner wrote Attorney Lins for the name of the person who investigated the March 1 bill and knew it to be correct. On April 24, GWP billed petitioner again and threatened to disconnect his home utility service on May 1.[10] Petitioner received the April 24 bill and statutory "disconnection notice" on April 26. On April 28 and to protect himself, petitioner lodged a statutory protest,[11] and according to instructions on the April 24 bill, a proposed

---

[9] Q.v., "If you believe your bill is incorrect, . . . we will provide you with a prompt explanation and/or investigation." I.e., representation on the back page of the March 1, 2000 utility bill.

[10] I.e., "The department may issue a disconnection notice for any delinquent bill and all services for a customer receiving such notice . . . may be disconnected without further notice." Q.v., G.M.C. § 13.44.500A (1999).

[11] I.e., "Electric service will not be disconnected if, within forty-eight hours following the delivery of a disconnection notice, a customer submits a written protest of the disputed bill containing all facts and evidence necessary to review the protest." Q.v., G.M.C. § 13.44.500B (1999).

payment arrangement[12] with Bernard Palk, respondent and Director of Public Service. On May 3, Attorney Lins wrote, "It appears from your [April 20 and 28] letters that you have a dispute over some charge on your bill. It is not clear from your letters what the dispute is. . . . " On May 8, petitioner wrote: If the April 24 bill for $159.05 "is properly payable, I will pay it" but if it "is *not* . . . , I will *not* pay it." And petitioner asked again: What is the name of the person who knows the April 24 bill is "true, correct and properly payable as a matter . . . of . . . fact"? On May 9, Attorney Lins wrote, "It [is] not clear from your records what the dispute could be about." On May 15, to clarify the record, petitioner focused on the bill due (i.e., the March 1 bill for $144.05 and the April 10 bill for $159.05), but on May 17, Collections Supervisor Tami Vallier, respondent, focused on the $159.05 amount due: repeating, "I have reviewed your previous correspondences with Mr. Lins, and I am not clear as to whether or not you are disputing this bill." On June 2, GWP billed petitioner for $159.05 and instructed him: "**PAY BEFORE 06/17/00**." But on June 5, 2000 respondents, to the surprise and hurt of petitioner, turned his home electric service off. And on June 6 morning, he paid them everything they demanded: $234.05.

Because Director Palk did not write petitioner[13] that his April 28 protest had been denied and that he had until

---

[12] Q.v., "The utility bill must be paid in full or payment arrangements made on full balance while the dispute is being investigated." I.e., representation on the back page of the April 24, 2000 utility bill.

[13] I.e., "The director of public service shall have final and conclusive determination of these protests and shall provide this determination to the customer in writing." Q.v., G.M.C. § 13.44.500B (1999).

June 5 to pay GWP's April 24 $159.05 demand or face a cutoff, petitioner was circumstantially forced to move out of his home on late June 5 afternoon as it had no electricity. But for Director Palk's silence during April 28 to June 5, 2000, this petitioner could have paid GWP its April 24 demand and avoided the June 5 and 6 loss of his property and home.[14]

C. Trial Court's Position on the Federal Question Presented

In petitioner's July 15, 2002 First Amended Complaint at the Third Cause of Action for *Gross Negligent Breach of a Mandatory Duty* (i.e., paragraphs 31-44), he alleged (q.v., paragraph 42):

> In violation of the process due plaintiff (i.e., GMC § 13.44.500), in disregard of the "one hundred dollars" already on deposit as security (i.e., GMC § 13.44.490A and C) with the city since February 1998, in disregard of the two and one-half year history of plaintiff's paying all undisputed utility bills (sixteen), and in disregard of the May 3, 2000 Payment Arrangement, Defendant Palk arbitrarily failed to resolve plaintiff's April 28, statutory objection about *Water & Power* Department error (i.e., "some collection of machines, known as 'a Public Service computer system,' accuses me of owing City $159.05, but this is not

[14] *Nota bene*, Director Palk's unconstitutional silence and surprise disconnection deprived petitioner of this opportunity discovered by Justice Stevens (dissenting) in *Memphis Light*: "[A] customer can always avoid termination by the simple expedient of paying the disputed bill and claiming a refund. . . . " *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 28 (1977).

so") by inadequate Factfinding, misuse of Expertise and want of Discretion.

Next, in petitioner's December 27, 2002 Civil Procedure Code § 632 Request for a Statement of Decision, he asked the trial court judge: "Whether Defendant Palk presented plaintiff with a 'final and conclusive [Section 13.44.500B] determination,' 'in writing,' before turning off plaintiff's home electric service?" On January 2, 2003, trial Judge William D. Stewart answered: "The Court finds no such determination was presented as no duty arose to do so." (Appendix A, App. 4.) Petitioner then asked: "Whether defendants deprived plaintiff of due process of law?" And Judge Stewart answered: "The Court finds that Defendants and none of them individually or collectively deprived Plaintiff of due process of law." (Appendix A, App. 5.)

Judge Stewart's January 2, 2003 analysis of why "no duty arose" for Director Palk to hear, to decide and to give notice on petitioner's April 28 written protest was that:

> The Court finds that as of April 2nd and thereafter Plaintiff knew that the claim of GWP in the amount of $144.05 was not a valid claim or otherwise in error because he had paid it with his check #2348 . . . and there was evidence that it had been deposited to the account of the City of Glendale . . . [¶] The Court further finds that Plaintiff's letter to Defendant City dated Friday April 28, 2000 . . . was a valid and correct exercise of his rights pursuant to Section 13.44.500B. The question remains, however, whether that communication was one 'containing all facts and evidence necessary to review the protest.' The Court finds that the true facts and evidence were readily and immediately available to Plaintiff: a

> copy of his check which either was available to him or could have been obtained by him. The Court finds that no duty arose on the part of Defendant City or its Director of Public Service to take any step or perform any act unless and until the customer has fulfilled the condition precedent i.e., has set forth all facts and evidence necessary to review his protest. Here, the fact was that he had paid the bill; here the evidence was his paid check. . . . The Court finds that Plaintiff's communication did not set forth all facts and evidence necessary for the responsible City official to review the protest. (Appendix A, App. 3-App. 4.)

Or, as Judge Stewart later said at the February 19, 2003 Civil Procedure Code § 663[1.] post trial hearing, "Well, I think [respondents'] service is okay. I think that you probably should have taken a copy of your canceled check to show that you paid it. [¶] That's the Court's ruling. I'm not going to disturb it. If I'm wrong, there's people that correct those things." (SRT 76:5-10.[15])

D. Appellate Division's Position on the Federal Question Presented

In petitioner's brief (December 8, 2003) to the Appellate Division court, he charged respondents with: Rather than investigate whether the April 24 "Public Service computer system" generated claim was payable;[16] rather

---

[15] *Nota bene*, "SRT" stands for the Wendy Scott Reporter's Transcript of May 5, 2003.

[16] Q.v., "If you believe your bill is incorrect, . . . we will provide you with a prompt explanation and/or investigation." I.e., representation on the back page of the April 24, 2000 utility bill.

than determine the April 28 protest;[17] and rather than honor the May 3 payment agreement,[18] respondents instead assumed their "computer system" was correct; pressed only for the "total now past due" claim regardless of any objections raised; and at an unseasonable and surprising time disconnected appellant's home electric service without first giving him Director Palk's pay or face a cutoff statutory warning according to G.M.C. § 13.44.500B.

To prove this December 8 charge, petitioner argued: Justice Powell said that "[f]undamental fairness, not simply considerations of 'courteous' treatment of customers, . . . informs the constitutional requirement of notice and the actual provision of a timely opportunity to meet with designated personnel who are duly authorized to review disputed bills and to correct any errors." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 16-17 and footnote 19 (1977). Because the promise to investigate the facts justifying Glendale *Water & Power's* April 24 claim against Customer Rees was never performed and because the law to determine Customer Rees' April 28 protest, and so notify, was never obeyed by Director Palk, appellant's right of "due process of law" as set out by Justice Powell in

---

[17] I.e., "The director of public service shall have final and conclusive determination of these protests and shall provide this determination to the customer in writing." Q.v., G.M.C. § 13.44.500B (1999).

[18] Q.v., "Finally, here is what I propose to correct the present injustice I suffer from the City Mr. Palk. Allow Mr. Lins and myself to complete our course of correspondence on the disputed $159.05 debt. If we need your help, we will write you. Have City keep sending me periodic utility bills for payment. Order City of Glendale *Water & Power* to task one of its Employees to investigate City's April 24, $159.05 claim against me." I.e., from petitioner's April 28, 2000 statutory protest at page 2, paragraph two. Footnotes omitted.

Memphis Light was violated by the respondents. *Memphis Light, Gas & Water Div.*, 436 U.S. at 16. In short, they never "actually provi[ded]" these services to their customer as required by the authority of *Memphis Light*.

Appellate Judge Isacoff's June 8, 2004 analysis of why Director Palk had "no duty to review" petitioner's April 28 protest and notify him of the review decision was that:

> Insofar as plaintiff's arguments [on appeal] address the [trial] court's conclusions of law based upon its findings of fact, we apply an abuse of discretion standard. [¶¶] [T]he [trial] court concluded that defendants owed no duty to review plaintiff's claim pursuant to Glendale Municipal Code section 13.44.500(B) because plaintiff failed to provide 'all facts and evidence necessary for the responsible City official to review the protest.' The court determined that 'as of April 2nd and thereafter Plaintiff knew that the claim of GWP in the amount of $144.05 was not a valid claim or otherwise in error because he had paid it with his check #2348 . . . and there was evidence that it had been deposited to the account of the City of Glendale . . .' Despite this knowledge, plaintiff failed to convey this relevant information to defendants. Under the facts of the case before us, we find plaintiff has failed to establish that the trial court abused its discretion in making its determination and entering judgment for defendants. [¶] The judgment is affirmed. (Appendix B, App. 12-App. 14.)

REASONS FOR ALLOWING THE WRIT

I. Appellate Decision on Federal Question Presented Increases Public Disorder

In the June 8 decision, Judge Isacoff, quoting Judge Stewart, stated: "The [trial] court determined that 'as of April 2nd and thereafter . . . the claim of GWP in the amount of $144.05 was not a valid claim . . . because [petitioner] had paid it with his check #2348 . . . and there was evidence that it had been deposited to the account of the City of Glendale . . . '" (Appendix B, App. 13.) But whether "the claim of GWP in the amount of $144.05 . . . had [been] paid" was not, according to the December 27, 2002 pleadings, before the trial court. The only issue lawfully before that court on December 27 was the third cause of action and whether Director Palk had on June 5, 2000 breached a mandatory duty of care—G.M.C. § 13.44.500B—by not previously writing his customer to warn him that his April 28 protest was denied and that he had just five days left from the envelope's postmark to pay GWP's April 24 demand for $159.05 or face a cutoff of home electric service altogether on June 5.

The state of California defines "a mandatory duty" in Government Code § 815.6:

> Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

In petitioner's December 27 Civil Procedure Code § 632 Request for a Statement of Decision, he asked trial judge Stewart: "Whether G.M.C. Section 13.44.500B [was] a Gov't Code § 815.6 Mandatory Duty?" And on January 2, 2003, he answered: "The Court finds that the Municipal Code of the City of Glendale Section § [*sic*] 13.44.500B creates a mandatory duty pursuant to Government Code § 815.6." (Appendix A, App. 5.)

Petitioner contends that respondents' disconnecting his home electric service on June 5 and then on the next day accepting his June 6, service restoration payment of $234.05 dispositively shows that: (*i*) respondents judged GWP's April 24, $159.05 disconnection notice—bill as correct and payable, and that (*ii*) they also judged his April 28 written protest as unproved. Accordingly, the trial court adjudicated, and the appellate court thereafter sustained, an issue of fact (i.e., "'as of April 2nd and thereafter . . . the claim of GWP in the amount of $144.05 was not a valid claim . . . because [petitioner] had paid it . . . '"[19]) and an issue of law (i.e., "defendants owed no duty to review plaintiff's [April 28 protest] pursuant to Glendale Municipal Code section 13.44.500(B) because [he] failed to provide 'all facts and evidence necessary for [Director Palk] to review the protest'"[20]) not explicitly decided by Director Palk during April 24 to June 5, 2000.

Judges Isacoff and Stewart construed the ambiguous verbal phrase—"containing all facts and evidence necessary to review the protest"—in G.M.C. § 13.44.500B as only meaning proof of customer payment rather than proof

---

[19] Q.v., Appendix B, App. 13. *See* also Appendix A, App. 3.

[20] Q.v., Appendix B, App. 13. *See* also Appendix A, App. 3-App. 4.

of customer protest of a statutory disconnection notice—bill.[21] And they also decided that this verbal phrase meant that should a customer fail to present the Director of Public Service with documentary evidence of his payment on a disputed disconnection notice—bill, the Director would then, as a matter of law, have: (*i*) no duty to investigate the customer's protest, (*ii*) no duty to determine the customer's protest, and also (*iii*) no duty to tell the customer of the intended service disconnection date should his payment of the disputed bill not be received at GWP's place of business before turn off time.

The June 8, 2004 appellate decision (Appendix B) effectively granted Director Palk an authority to demurrer to his customers' written protests.[22] And he, by being silent during April 28 to June 5, 2000, arrogated to himself a like authority to demurrer to his customers' protests too. But if Judges Isacoff and Stewart knew that "as of April 2nd and thereafter" GWP's "claim . . . in the amount of $144.05 was not a valid claim . . . because [petitioner] had paid it . . . ," why didn't they act on this information and order restitution of petitioner's June 6 overpayment (i.e., the $234.05) to GWP?[23]

All of this is presented to show this Supreme Court that petitioner's June 5 and June 6, 2000 property loss was caused by a single violation of the U. S. Constitution:

---

[21] I.e., G.M.C. § 13.44.500A (1999). *See* footnote 10 above.

[22] I.e., the Director of Public Service could deny that his customer's protest was legally entitled to G.M.C. § 13.44.500B review and notice.

[23] I.e., on January 2, 2003, Judge Stewart decided that "Plaintiff has no measure of collectible damages." (Appendix A, App. 5.) And on June 8, 2004, Judge Isacoff decided that "The judgment is affirmed. Respondents to recover costs on appeal." (Appendix B, App. 6.)

Director Palk's failure to give petitioner prior G.M.C. § 13.44.500B written notice that his April 28 protest was denied and that he had only five more days to pay GWP's April 24, $159.05 demand or face electric service cutoff on June 5.

The trial and appellate court positions on the Federal Question Presented assume Director Palk would have favorably decided petitioner's April 28 protest had the director received a copy of "check #2348."[24] But these two courts disregard Director Palk's discretion: "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." Government Code § 820.2. And they also disregard Assistant City Attorney Lins' April 10, 2000 representation that since before "March 27, 1998 ... utility bills [at GWP] are generated by a Public Service computer system" and not by people;[25] and also that "GWP does not have a specific written Rule or Procedure that is used to determine if a bill is incorrect."

Respondents relied solely on their "computer system" to prove Customer Rees owed them $159.05: payable during April 24 to June 5? And there was no "Rule or

---

[24] *Per contra*, unlike the trial and appellate courts, Justice Stevens (dissenting) recognizes the fallibility of human administrators: "It is an unfortunate fact that when the State assesses taxes or operates a utility, it occasionally overcharges the citizen." Q.v., *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 30 (1977).

[25] *Nota bene*, Justice Powell (majority) warns about the problems of computer error: "And the risk of an erroneous deprivation, given the necessary reliance on computers, is not insubstantial." (Footnotes omitted.) Q.v., *Memphis Light, Gas & Water Div.*, 436 U.S. 1, 18 (1977).

Procedure . . . used [by GWP staff] to determine if [Customer Rees' April 24] bill [was] incorrect" or not? Couple these two facts with the June 8, 2004 appellate authority (Appendix B, App. 13) that: Should Director Palk determine Customer Rees' April 28 protest "failed to provide 'all facts and evidence necessary for . . . [him] to review [that] protest,'" he was then at liberty to disconnect petitioner's home electric service at any time and without any notice? What business purpose is served by not giving your customer G.M.C. § 13.44.500B notice? On June 5, 2000, Director Palk denied petitioner's April 28 protest not by operation of law but by operation of his silence. This was not Justice; this was Brutishness.

Finally, if the purpose of statutory protests[26] is for customers to prove they paid earlier statutory disconnection notice—bills,[27] why did respondents wait thirty-five days past the original May 1, 2000 deadline to turn off petitioner's home electric service? And why also did they mail him several letters during that thirty-five day period when one statutory notice was enough to end the administrative dispute? What was the price to Director Palk for mailing one section 13.44.500B notice to his customer? Five dollars? What was the price to petitioner for Director Palk's thirty-eight days of silence? An avoidable $565.13. (Q.v., petitioner's First Amended Complaint at paragraph 45.)

---

[26] Q.v., G.M.C. § 13.44.500B (1999). *See* footnote 11 above.

[27] Q.v., G.M.C. § 13.44.500A (1999). *See* footnote 10 above.

II. Appellate Decision on Federal Question Presented Does Not Follow Precedent

During an ongoing course of business correspondence between the parties (i.e., from March 1 to April 20, 2000), Glendale *Water & Power* on April 24 mailed a **FINAL DISCONNECT NOTICE** and bill[28] for $159.05 (effective May 1) to petitioner. Surprised by the severe, seven-days-or-else demand, petitioner, relying on state law[29]—

> No public utility shall terminate residential service for nonpayment in any of the following situations: [¶] (1) During the pendency of an investigation by the public utility of a customer dispute or complaint. [¶] (2) When a customer has been granted an extension of the period for payment of a bill[,]

and remembering James Madison's counsel on creditor/debtor factions[30]—

> No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity[,]

mailed (and faxed) on April 28 to Director Palk: (*i*) a section 13.44.500B written protest,[31] (*ii*) a request for an investigation, and (*iii*) a proposed payment arrangement so as to avoid disconnection of home electric service on May 1.

---

[28] I.e., G.M.C. § 13.44.500A (1999). *See* footnote 10 above.

[29] I.e., Public Utilities Code § 10010(b).

[30] Q.v., THE FEDERALIST NO. 10 (James Madison).

[31] I.e., G.M.C. § 13.44.500B (1999). *See* footnote 11 above.

Accordingly, petitioner's timely protest (i.e., lodged "within forty-eight hours following" the receipt of that April 24 disconnection notice—bill[32]) coupled with the respondents' May 1 inaction and their May 3 responding letter convicted him that "[t]he director of public service," Bernard V. Palk, would determine the April 28 protest and "provide [his] determination to . . . customer [Rees] in writing."[33] From May 3 to June 12, 2000, the parties exchanged letters on the disputed April 24 debt. But on June 5 respondents disconnected—and to his injury—petitioner's home electric service, and on June 6 they accepted his payment of $234.05 for same-day restoration of service.

A case like petitioner's is *E. C. Schultz v. Town of Lakeport*, 54 P.2d 1110 (California 1936). During April 1927 to June 1932, E. C. Schultz subscribed to and received water service at the rate of $1.50 per month from the Town of Lakeport. During that sixty-two month period, he was never billed for any water service nor paid for any water service to the Town of Lakeport. *Schultz*, 54 P.2d at 1111.

In June 1932, Town of Lakeport demanded payment of $129.65 from Schultz for sixty-two months of water rent arrears. He declined to pay the Town's claim for three reasons: (*i*) "he was financially unable to do so"; (*ii*) "he thought the person from whom he purchased his residence had been paying the water bills"; and (*iii*) he claimed a portion of the sixty-two months of arrears "was barred by the statute of limitations." *Schultz*, 54 P.2d at 1111.

---

[32] I.e., G.M.C. § 13.44.500A (1999). *See* footnotes 10 and 11 above.

[33] I.e., according to G.M.C. § 13.44.500B (1999). *See* footnote 13 above.

Schultz and Town could not reach a compromise on payment of the disputed amount of water rent arrears nor was Town willing to continue present water service to his residence pending resolution of that dispute. So on Tuesday, August 2, 1932 and with the knowledge of Schultz, Town disconnected his residential water service and sued him for the $129.65 in water rent arrears. *Schultz*, 54 P.2d at 1111.

Town was awarded $36.69 in damages because it "failed to prove a book account" and because its sixty-two month claim for $129.65 in water rent arrears "with the exception of the amount due for the period of two years prior to the commencement of [its 1932] action . . . was barred by the statute of limitations." *Schultz*, 54 P.2d at 1111.

"Schultz subsequently paid the sum of $36.69 to the [Town of Lakeport] and water service at his residence was resumed on [Sunday,] October 16, 1932." *Schultz*, 54 P.2d at 1111-1112. In September 1933, Schultz sued the Town of Lakeport for the damages caused to his land by its seventy-five days of "wrongful discontinuance of . . . water service" to his residence. He got a favorable judgment, and Town of Lakeport appealed the decision. *Schultz*, 54 P.2d at 1112.

Relevant to this case now was the 1936 appeal issue of how the Town of Lakeport used its "summary power of shutting off [the] water [service at Schultz's residence] to coerce payment of current bills. . . . " *Schultz*, 54 P.2d at 1113. It was decided that:

> 'While a public service water company has the right to cutoff a consumer's water supply for nonpayment of recent and just bills for water

> rents, and may refuse to engage to furnish further supply until said bills are paid, the right cannot be exercised so as to coerce the consumer into paying a bill which is unjust, or which the consumer in good faith and with show of reason disputes, by denying him such a prime necessity of life as water, when he offers to comply with the reasonable rules of the company as to such supply for the current term.'

Schultz, 54 P.2d at 1112.

Accordingly, during the spring of 2000, this petitioner paid all undisputed Glendale *Water & Power* utility bills when due.[34] And on April 28, 2000, he "in good faith and with show of reason" timely presented his statutory protest of Glendale *Water & Power's* April 24 bill to Director Palk for his determination.[35] This petitioner reasonably complied with the authority of *E. C. Schultz v. Town of Lakeport*, 54 P.2d 1110 (California 1936).

Unlike E. C. Schultz who on August 2, 1932 knew that his home water service was going to be disconnected during the pendency of the billing dispute that he was having with the Town of Lakeport, this petitioner did not know that on June 5, 2000 his home electric service was to be disconnected so he would pay the protested April 24

---

[34] Q.v., petitioner's First Amended Complaint at paragraphs 5 and 21.

[35] Q.v., "As I understand City's April 10 spokesman, Steven G. Lins, some collection of machines, known as 'a Public Service computer system,' accuses me of owing City $159.05, but this is not so. Until City produces a Witness who has personal knowledge of the $159.05, April 24 claim and who understands the duty to tell the truth, City has no reasonable proof I owe it $159.05." I.e., from petitioner's April 28, 2000 statutory protest at page 2, paragraph one.

bill! Director Palk by illegal artifice—a silent demurrer—coerced his customer to pay his employer's April 24 demand.

But in Spring 2000 Director Palk did not have the authority to make rules for the City of Glendale.[36] The City Council only gave him the authority to determine section 13.44.500B protests; not the authority to rule on his own demurrers concerning those protests. And the Glendale city charter "is the supreme law of the city on its municipal affairs." *Smith v. City of Glendale et al.*, 36 P.2d 1083, 1084 (Cal. Ct. App. 1934).

According to *Aragon* and the Glendale City Council, "[t]he responsibility of applying [G.M.C. § 13.44.500B] to the facts [of petitioner's April 28, 2000 written protest] was given in the first instance to [Director Palk]" and not to trial Judge Stewart. *Unemployment Compensation Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946). Judge Stewart's trial authority was to decide whether Director Palk did his section 13.44.500B duty during April 24 to June 5, 2000.

In *Aragon* the Supreme Court said: "A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to

---

[36] *Nota bene*, "The city manager shall prescribe . . . rules and regulations relating to conditions of service, the application, administration and interpretation of rates, and to the sale of electric energy by the city, and of products, commodities and services incidental thereto, and the charges to be made therefor. Such rules and regulations shall be of general application not inconsistent with the provisions of this chapter and before becoming effective shall be approved by the council by resolution. . . ." Q.v., G.M.C. § 14.44.440 (1997).

consider the matter, make its ruling, and state the reasons for its actions." (Footnote omitted.) *Aragon*, 329 U.S. at 155. The Court also said: "The 'reviewing court's function is limited.' All that is needed to support the [agency's] interpretation is that it has 'warrant in the record' and a 'reasonable basis in law'" for its decision. (Citations omitted.) *Aragon*, 329 U.S. at 153-154. Director Palk never presented to the trial court any administrative finding of fact or conclusion of law about this petitioner's April 28 protest justifying him to disconnect petitioner's home electric service silently on June 5, 2000. Without a Director developed administrative record to read and without a City Council established administrative demurrer procedure to analyze, the trial (Appendix A) and appellate (Appendix B) courts could not legally justify Director Palk's silent June 5 actions.

Like the Food and Drugs Administration (FDA), Glendale's director of public service has "primary jurisdiction" to determine section 13.44.500B protests of section 13.44.500A disconnection notice—bills. Accordingly, agency review of these protests must precede court review. And according to *Hynson*: "FDA does not have unbridled discretion to do what it pleases. Its procedures must satisfy the rudiments of fair play. Judicial relief is available only after administrative remedies have been exhausted." *Weinberger v. Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609, 627 (1973).

Unlike Director Palk, the FDA Commissioner already had administrative judgment procedures in effect before the dispute with Hynson Drugs occurred. *Hynson*, 412 U.S. at 620. Unlike Director Palk, the FDA Commissioner communicated his decision to Hynson warning: Your drug

"Lutrexin is not exempt from [Congress'] 1962 amendments and . . . [you] ha[ve] not [yet] submitted adequate evidence that Lutrexin is not a new drug or is effective." *Hynson,* 412 U.S. at 616.

Palk should have followed the 1973 example of the FDA Commissioner. Palk should have gone to his City Council for an administrative demurrer procedure before mailing that April 24 statutory demand. And Palk should have rendered his section 13.44.500B five-day notice duty to petitioner on May 3 since he waived his section 13.44.500A disconnection authority on May 1.

For this Court to sustain the Appellate Division's June 8 decision (Appendix B) would be to agree the trial court was right to come to the aid of the silent Bernard Palk, municipal utility administrator, and provide him with a plausible legal theory to "justify" his June 5 and June 6 actions. But to do this would, "in effect substitute the [Superior] Court for the [Utility Director] as the tribunal to hear and determine what [City Council] declared the [Director himself] exclusively should hear and determine in the first instance." This kind of substitution was condemned by Justice Brandeis sixty-four years ago in *Myers v. Bethlehem Corp.*, 303 U.S. 41, 50 (1938).

Finally, in *McCarthy v. Madigan*, 503 U.S. 140 (1992), Chief Justice Rehnquist said, "short filing deadlines will almost always promote quick decisionmaking by an agency. . . . " *McCarthy*, 503 U.S. at 157. Director Palk did not follow this advice. Also, Director Palk had two California lawyers to assist him. Surely City Attorney Scott Howard, "legal advisor of all city officers" and "draft[er of] all proposed ordinances for the city"[37] along with his

[37] Q.v., Glendale City Charter, art. VIII, § 2.

colleague and the spokesman for Director Palk, Assistant City Attorney Steven Lins, warned Director Palk of the consequences of his silence, of waiver and estoppel, of failure to exhaust administrative remedies, and of violating the Fourteenth Amendment's Due Process Clause. It does not appear he listened to advice of counsel.

CONCLUSION

Pastor H. M. S. Richards tells this story: "It is said that a man went to Alexander the Great and asked for some money as a marriage portion for his daughter. Alexander told him to go to his treasurer and ask for what he wanted. He went and demanded an enormous amount. The treasurer was startled and came to Alexander and said that he thought a small part of what the man had asked for would be enough. 'No,' said Alexander, 'let him have it all. I like that man. He does me honor. He treats me like a king and proves by what he asks that he believes me to be both rich and generous.'" I do too.

Your Honors, I ask for the dignity of being told by "the responsible City official": You lose your protest. Please pay the $159.05 previously demanded. Sincerely Bernard V. Palk, Director of Public Service, Glendale *Water & Power*.

Thank you.

Respectfully submitted October 13, 2004

PHILIP C. REES
Utility Customer and Attorney Pro Se
410 East Harvard Street, #A
Glendale, California 91205-1058

TABLE OF APPENDICES

Page

A. Los Angeles Superior Court's Ruling on Submitted Matter and Order for Judgment in *Rees v. City of Glendale et al.*, filed on January 2, 2003 .....App. 1

B. Appellate Division of the Los Angeles County Superior Court's Memorandum Judgment in *Rees v. City of Glendale et al.*, filed on June 8, 2004 .....App. 6

C. Appellate Division of the Los Angeles County Superior Court's Order Denying Rehearing and Denying Certification in *Rees v. City of Glendale et al.*, filed on July 1, 2004 .....App. 15

D. Court of Appeal of the State of California, Second Appellate District's Order in *Rees v. City of Glendale et al.*, filed on July 15, 2004.....App. 16

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

NORTH CENTRAL DISTRICT – GLENDALE

Philip C. Rees, Plaintiff, vs. City of Glendale, Steven Lins, Bernard Palk, Tami Vallier, Defendants.	Case No. 01 C 02894 **RULING ON SUBMITTED MATTER AND ORDER FOR JUDGMENT** (Filed Jan. 2, 2003)

The above matter came on regularly for trial on the 27th day of December, 2002, in Division Three of the above Court, Honorable William D. Stewart, Judge, Presiding. Plaintiff Philip C. Rees represented himself *in propria persona*; Defendants were represented by Scott H. Howard, City Attorney by Steven E. Weitz, Assistant City Attorney. The individual Defendants are employees of the Defendant City as follows: Steven Lins, Assistant City Attorney; Bernard Palk, Director of Public Services Department; Tami Vallier, collections supervisor, City of Glendale Water & Power. Testimony was taken, evidence introduced, arguments presented and the matter was taken under submission, and a request for statement of decision having been made, and the Court being fully advised in the premises, and the matter having been submitted for decision, the Court now makes the following findings of fact, decisions, and rules and orders as follows:

SUMMARY

Complaint for Damages for Gross Negligent Breach of a Duty to Investigate; A payment arrangement; and a Mandatory Duty (GMC § 13.44.500B). Previously, the pleadings were settled as follows: Demurrers of Defendants to the First Amended Complaint were sustained without leave to amend as to the First and Second Alleged Causes of Action and overruled as to the Third alleged Cause of Action for Breach of a Mandatory Duty; Defendants' motion to strike was granted without leave to amend. The issues were joined by Defendants' Answer which also raised nineteen affirmative defenses; no demurrers to the answer were filed, nor any motions to strike.

The issues do involve a portion of the Municipal Code of the City of Glendale, a California charter city. Section 13.44.500B of that Code provides: "Electric service will not be disconnected if, within forty-eight hours following the delivery of a disconnection notice, a customer submits a written protest of the disputed bill containing all facts and evidence necessary to review the protest. The director of public service shall have final and conclusive determination of these protests and shall provide this determination to the customer in writing. Should the protest be denied, electric service shall be disconnected within either forty-eight hours from the date of personal service of the determination or within five days from the date of mailing of the determination." The Defendant City provides electrical power, bills customers such as Plaintiff on a metered basis. The present dispute relates to a billing which Plaintiff had in fact paid, but which had not been properly credited to his account as a result of failure, human or

machine, or both. Plaintiff contends he requested a determination as set forth in the code, but that the City disconnected his service without the required determination being made.

FINDINGS OF FACT AND DISCUSSION:

The Court finds as follows: per stipulation of the parties, Plaintiff was a customer of the Defendant City's Glendale Water & Power ("GWP"). Service was provided to Plaintiff's residence at 410 East Harvard # A. The Court finds that on or about April 2nd, 2000 Plaintiff mailed to GWP his check # 2358 for $120.15 to cover the then current charges, and also raised questions concerning a "Reminder Notice" in the amount of $144.05. (Exhibit "A") These questions were in the nature of information requests pursuant to Govt. Code § 6253 et seq. The Court finds that as of April 2nd and thereafter Plaintiff knew that the claim of GWP in the amount of $144.05 was not a valid claim or otherwise in error because he had paid it with his check #2348 (Exhibit "37") and there was evidence that it had been deposited to the account of the City of Glendale indicated by the endorsed notation on the reverse of the check: "Deposit for the City of Glendale Account 01627-80210 BankAmerica 02-29-2000 14:11 Receipt: 481435 Operator: LN Cust: 0016844 Trans.Code: 2 Amount 144.05"

Further, the Court finds that Plaintiff's bank paid the check (Exhibit "38").

The Court further finds that Plaintiff's letter to Defendant City dated Friday April 28, 2000 (Exhibit "2") was a valid and correct exercise of his rights pursuant to Section 13.44.500B. The question remains, however,

whether that communication was one "containing all facts and evidence necessary to review the protest." The Court finds that the true facts and evidence were readily and immediately available to Plaintiff: a copy of his check which either was available to him or could have been obtained by him. The Court finds that no duty arose on the part of Defendant City or its Director of Public Service to take any step or perform any act unless and until the customer has fulfilled the condition precedent i.e., has set forth all facts and evidence necessary to review his protest. Here, the fact was that he had paid the bill; here the evidence was his paid check. Plaintiff urges otherwise: he was protesting the $159.05 claim set forth in the final disconnect notice (Exhibit "1") which is itself a bill in that it demands payment and sets forth the terms. But this argument does not prevail because the City was demanding payment of a sum of which the Court finds Plaintiff was perfectly knowledgeable: footnote "1" in Plaintiff's letter to Mr. Palk (Exhibit "2") sets forth the components of that sum, even though an error of $1.00 slipped in. The Court finds that Plaintiff's communication did not set forth all facts and evidence necessary for the responsible City official to review the protest.

Plaintiff's request for a statement of decision enumerates several requests for findings which the Court addresses here by number:

1. The Court so finds: addressed above.

2. The Court finds no such investigation was made as no duty arose to do so.

3. The Court finds no such determination was presented as no duty arose to do so.

4. The Court finds that the Municipal Code of the City of Glendale Section § 13.44.500B creates a mandatory duty pursuant to Government Code § 815.6.

5. The Court finds that Defendants and none of them individually or collectively deprived Plaintiff of due process of law.

6. The Court finds that none of the Affirmative defenses of the Defendants apply to this case in light of the findings made by the Court.

7. The Court finds that Plaintiff has no measure of collectible damages under the claim for relief set forth in the First Amended Complaint.

ORDER FOR JUDGMENT

WHEREFORE, the Court orders judgment be entered as follows: That Plaintiff take nothing by reason of his First Amended Complaint herein and that Judgment be entered in favor of all Defendants against Plaintiff for costs per memorandum timely filed. The Clerk is directed to enter judgment hereon.

Dated: Jan. 2, 2003 /s/ Stewart
William D. Stewart,
Judge

APPELLATE DIVISION OF THE SUPERIOR COURT
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PHILIP C. REES, Plaintiff and Appellant, v. CITY OF GLENDALE, et al., Defendants and Respondents.	)	No. BV 024849 Glendale Trial Court No. 01C02894 **MEMORANDUM JUDGMENT** (Filed Jun. 8, 2004)

This cause having been submitted for decision, and fully considered, judgment is ordered as follows:

The judgment is affirmed. Respondents to recover costs on appeal.

Plaintiff and appellant Philip C. Rees appeals from: (1) the trial court's order sustaining defendants' demurrer to the first and second causes of action of the first amended complaint without leave to amend; (2) the trial court's order granting defendants' motion to strike portions of the first amended complaint; (3) the judgment entered in favor of defendants on January 2, 2003; and (4) the order denying plaintiff's motion to vacate the judgment and enter another judgment.

PROCEDURAL HISTORY

On October 24, 2001, plaintiff filed a complaint for damages against defendants and respondents City of Glendale (Glendale), and its employees-Steven Lins (Lins), Bernard Palk (Palk), and Tami Vallier (Vallier). The complaint stemmed from defendants alleged failure to

record plaintiff's payment made for public utility services rendered by defendant City of Glendale. Plaintiff alleged claims for (1) gross negligent breach of a duty to investigate; (2) gross negligent breach of a payment arrangement; and (3) gross negligent breach of a mandatory duty. On January 23, 2002, defendants Glendale, Lins, Vallier, and Pike filed a demurrer and motion to strike plaintiff's complaint. On June 7, 2002, defendants' demurrer to the complaint was sustained with leave to amend.

On July 15, 2002, plaintiff filed a first amended complaint. The first amended complaint alleged the same claims alleged in the original complaint. On July 18, 2002, defendants City of Glendale, Steven Lins, and Tami Vallier filed a demurrer and a motion to strike plaintiff's first amended complaint. In their demurrer, defendants argued that each of the three causes of action failed to state facts sufficient to state a cause of action. (Code Civ. Proc., § 430.10, subd. (e).) The motion to strike sought to strike all requests for punitive and exemplary damages and all references to general damages. On September 18, 2002, the trial court sustained the demurrer to the first and second causes of action without leave to amend and granted the motion to strike in its entirety.

On December 27, 2002, a court trial was held on the remaining cause of action, "*Gross Negligent Breach of a Mandatory Duty.*" On January 2, 2003, the trial court issued a statement of decision and entered judgment for defendants in accordance with the court's findings of fact and conclusions of law. Plaintiff subsequently filed a motion to vacate the judgment and enter a new judgment. On February 13, 2002, after a hearing on plaintiff's motion to vacate the judgment, the motion was denied by the trial court.

CONTENTIONS ON APPEAL

On appeal, plaintiff asserts the following contentions:

1. "RATHER THAN DECIDE WHETHER DIRECTOR PALK DID HIS G.M.C.[1] § 13.44.500[B] DUTY, THE COURT DECIDED CUSTOMER REES 'DIDN'T EVER TELL [RESPONDENTS] . . . [HE] HAD PAID THE BILL OR SENT THEM A COPY OF THE CHECK,' AND HE DID NOT FOLLOW 'THE WAY THE WORLD WORKS . . .' EITHER"

2. "ON JUNE 5 WITHOUT ANY G.M.C. § 13.44.500[B] NOTICE, RESPONDENTS DISCONNECTED CUSTOMER REES' HOME ELECTRIC SERVICE BECAUSE HIS APRIL 28 PROTEST WAS VARIOUSLY: A MERE REQUEST FOR INFORMATION; ILLEGITIMATE; INSUFFICIENT; IMPROPER; APPARENT; UNREASONABLE; FACT LESS; AND UNCLEAR"

3. "RATHER THAN INVESTIGATE WHETHER THE APRIL 24 'PUBLIC SERVICE COMPUTER SYSTEM' GENERATED CLAIM WAS PAYABLE; RATHER THAN DETERMINE THE APRIL 28 PROTEST; AND RATHER THAN HONOR THE MAY 3 PAYMENT AGREEMENT, RESPONDENTS INSTEAD ASSUMED THEIR 'COMPUTER SYSTEM' WAS CORRECT; PRESSED ONLY FOR THE 'TOTAL NOW PAST DUE' CLAIM REGARDLESS OF ANY OBJECTIONS RAISED; AND AT AN UNREASONABLE AND SURPRISING TIME DISCONNECTED APPELLANT'S HOME ELECTRIC SERVICE WITHOUT FIRST GIVING HIM DIRECTOR PALK'S PAY OR FACE

[1] Glendale Municipal Code.

A CUTOFF STATUTORY WARNING (Q.v., G.M.C. § 13.44.500[B])"

4. "WITHOUT PROTECTING CUSTOMER REES' HOME-HIS FUNDAMENTAL, VESTED RIGHT-FROM A TRESPASSORY DISPOSSESSION; WITHOUT ENFORCING THE SINCE-JANUARY-1998 ELECTRIC SERVICES CONTRACT; AND WITHOUT TREATING DIRECTOR PALK'S AND CUSTOMER REES'S PERFORMANCES DURING APRIL 24 TO JUNE 6 BY THE SAME LEGAL STANDARDS, THE TRIAL COURT DEPRIVED THE APPELLANT OF 'THE THREAT OF DAMAGES LIABILITY [AGAINST RESPONDENT'S] FOR [THEIR] MISTAKES' "[2]

FACTS

At the commencement of trial, plaintiff and defendant City of Glendale[3] stipulated that plaintiff was a customer of Glendale Water and Power (GWP) and that service was provided to plaintiff's residence at 410 East Harvard Street, #A, in Glendale. Sometime after January 2000, plaintiff made a payment of $144.05 for utility service provided during the period of November 1999, through January 2000.[4] GWP received the payment, but failed to credit plaintiff's account. As a consequence, overdue notices were sent to plaintiff. Plaintiff received a final disconnect notice on April 26. The notice indicated that the

---

[2] We have omitted the underlining and font variations contained in appellant's opening brief. Further, all grammatical and spelling errors are as reflected in the original text.

[3] Only defendant City of Glendale was represented at trial.

[4] Unless otherwise indicated, all further dates shall reference 2000.

balance must be paid in full, that plaintiff should not mail his payment, and that plaintiff should respond promptly. Defendant received a notice announcing "turn-off" on or about June 5. Ultimately, plaintiff's utility service was turned off.

Prior to the interruption in his utility service, plaintiff engaged in a series of written communications with various employees of the City of Glendale. According to plaintiff, one of his communications was included with "a payment" on April 2.[5] Plaintiff also testified that another of his communications regarding the overdue payment consisted of a registered letter that was dated April 20. The letter was addressed to defendant Lins, an assistant city attorney for the City of Glendale. During cross-examination, when asked whether the contents of his letters concerned the past due amount for his utilities, plaintiff merely provided evasive answers, i.e., "[i]t [the letter of April 2] concerned what I wrote about."

Plaintiff testified to some of the replies that he received to his various communications. He acknowledged that the author of a May 3 letter, defendant Lins, indicated that the "City" was uncertain as to whether plaintiff was protesting a disputed bill pursuant to Glendale Municipal Code 13.44.500(B). Plaintiff also indicated that throughout May he continued to correspond with various city employees. Plaintiff acknowledged that the canceled check for the payment in question had been returned to him and that his bank statement indicated that payment had been made on the check.

---

[5] The documents referred to in this opinion are not a part of the record on appeal.

Plaintiff testified that as a result of the interruption in power to his residence, he suffered a total loss of $572. He further testified that "[o]ne of the difficulties I had in my course of correspondence with the various persons that answered my letters is I couldn't get facts . . ." Plaintiff said that he kept looking for a denial of his protest or "someone who was willing to talk about the facts and be specific and try and reach an understanding that we could both live with." When asked if he had ever told the city that he had the deposited, canceled check for the payment in question, plaintiff responded, "The circumstances never ripened, and I never did."

DISCUSSION

At trial, plaintiff claimed that as a result of his communications to the city concerning the disputed claim, the city had a mandatory duty to investigate and provide him with the information requested in his communications. Plaintiff maintained that he had lodged a sufficiently good protest that should have been responded to and that the city breached its duty by failing to investigate and supply him with the information he requested. Plaintiff's arguments on appeal, in large part, dispute the trial court's findings of fact that are contained in the court's statement of decision. To that extent, we cannot consider plaintiff's arguments because we cannot re-litigate the facts on appeal.

"The function of an appellate court is to review *errors of law* and not to pass on questions of fact." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 316, p. 354, original italics.) It is the exclusive province of the trial judge or jury to weight the evidence or determine credibility.

(*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330; *Oldham v. Kizer* (1991) 235 Cal.App.3d 1046, 1065; see also *Estate of Joslyn* (1995) 38 Cal.App.4th 1428, 1434.) Where there is a conflict in the evidence, it is the judge or jury that determines whether a witness is credible and "the truth or falsity of the facts on which that determination depends." (*People v. Jones* (1990) 51 Cal.3d 294, 314.)

Insofar as plaintiff's arguments address the court's conclusions of law based upon its findings of fact, we apply an abuse of discretion standard. "[A] reviewing court should not disturb the exercise of a trial court's discretion unless it appeals that there has been a miscarriage of justice. . . . 'It is fairly deducible from the cases that one of the essential attributes of abuse of discretion is that it must clearly appear to effect injustice. [Citations.] Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566, quoting from *Loomis v. Loomis* (1960) 181 Cal.App.2d 345, 348-349.)

On appeal, plaintiff argues that defendants owed him a mandatory duty to investigate and resolve his "claim" pursuant to Glendale Municipal Code, section 13.44.500(B). That section provides in relevant part:

> Electric service will not be disconnected if, within forty-eight hours following the delivery of a disconnection notice, a customer submits a written protest of the disputed bill containing all

> facts and evidence necessary to review the protest. The director of public service shall have final and conclusive determination of these protests and shall provide this determination to the customer in writing. Should the protest be denied, electric service shall be disconnected within forty-eight hours from the date of personal service of the determination or within five days from the date of mailing of the determination.[6]

At the conclusion of trial, the court concluded that defendants owed no duty to review plaintiff's claim pursuant to Glendale Municipal Code section 13.44.500(B) because plaintiff failed to provide "all facts and evidence necessary for the responsible City official to review the protest." The court determined that "as of April 2nd and thereafter Plaintiff knew that the claim of GWP in the count of $144.05 was not a valid claim or otherwise in error because he had paid it with his check #2348 (Exhibit '37') and there was evidence that it had been deposited to the account of the City of Glendale . . ." Despite this knowledge, plaintiff failed to convey this relevant information to defendants. Under the facts of the case before us, we find plaintiff has failed to establish that the trial court abused its discretion in making its determination and entering judgment for defendants.

---

[6] For clarification and context, Glendale Municipal Code section 13.44.500(A) provides: "All charges for electricity sold, furnished, supplied or delivered by the department shall be due and payable upon presentation of the bill, and if not paid within nineteen days thereafter shall be deemed delinquent. The department may issue a disconnection notice for any delinquent bill and all services for a customer receiving such notice by mail or other delivery may be disconnected without further notice . . ."

The judgment is affirmed.

/s/ S. Isacoff
Isacoff, J.

We concur.

/s/ C. Lee
Lee, P.J.

/s/ Fumiko [Illegible] Wasserman
Wasserman, J.

APPELLATE DIVISION
OF THE SUPERIOR COURT

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

PHILIP C. REES, Plaintiff and Appellant, v. CITY OF GLENDALE, et al., Defendants and Respondents.	No. BV 024849 Glendale Trial Court No. 01C02894 **ORDER DENYING REHEARING AND DENYING CERTIFICATION** (Filed July 1, 2004)

The petition of appellant for a rehearing after judgment of this court on appeal or, in the alternative, certification of cause to the Court of Appeal in the above-entitled case, having been filed and having been duly considered,

Said petition is hereby denied.

/s/ SE Isacoff
Isacoff, Acting P.J.

/s/ Fumiko [Illegible] Wasserman
Wasserman, J.

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

PHILLIP C. REES, Plaintiff and Appellant, v. CITY OF GLENDALE et al., Defendants and Respondents.	B176438 (Super. Ct. [App. Div.] No. BV024849) (Super. Ct. No. 01C02894) ORDER (Filed July 15, 2004)

THE COURT*:

The court has read and considered the petition filed by appellant Rees July 9, 2004, seeking transfer of his case from the Appellate Division of the Superior Court to this court. (Cal. Rules of Court, rule 64(b).) This court has determined that transfer under rule 62 of the California Rules of Court is not necessary. The petition is denied.

/s/ Johnson — /s/ Woods

*JOHNSON, Acting P.J. — WOODS, J.